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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 246, Misc.

ALFRED W. PERKINS and SUE GARRETT PERKINS,

Petitioners,

vs.

FRANCES H. BACH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Introduction.

It would be difficult indeed to imagine a case less worthy of the attention of this court than the present. Indeed, one is left with the discomforting conjecture that the petition for certiorari was filed for the principal purpose of delaying the issuance of the mandate to the District Court in order that Mr. and Mrs. Perkins might continue for several more months to occupy the house in question at a nominal rental of five dollars a month and prevent its owner Mrs. Bach from selling it, a policy which the Perkins have successfully pursued already for a period of little short of three years.

Being a *"per curiam"* decision the opinion of the Court of Appeals is brief and does not discuss at any length the controlling California authorities. On a celar question of law this, however, is the prerogative of an appellate court.[1] Petitioners seek to take advantage of this absence of any extended discussion of the evidence or of the controlling authorities in their pending Petition. However, the heart of the opinion lies in the following few sentences:

> "The trial court found that the plaintiffs have a life tenancy or right to occupy at the nominal rental above mentioned so long as either shall survive. Also it found that Mrs. Bach is estopped to assert the Statute of Frauds.
>
> "For the purposes of this case, technicalities of estoppel theories need not be considered beyond saying that any kind of an estoppel as a minimum involves some kind of a reliance or change of position to the detriment of him who asserts estoppel. On combing the record, the reliance one finds can only be that the plaintiffs, who are the financially hapless relatives of the well-to-do Mrs. Bach and of the well-to-do late Mrs. Hadcock, have acquired a standard of living beyond the $200 per month which the plaintiffs receive from the estate of the late Samper A. Perkins." [Rec. p. 160.]

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[1] *Minor v. Fike,* 77 Kan. 806, 93 Pac. 264:

"The *per curiam* decision announces, in effect that all the justices of this court are of one mind regarding the same, and that the case is so clear as to render discussion thereof unnecessary. 6 Words & Phrases, 5285, and authorities there cited."

Clarke v. Western Assur. Co., 146 Pa. 561, 23 Atl. 248, 249:

"A *per curiam* is the opinion of the court, in a case in which we are all of one mind and so clear that we do not think it necessary to elaborate it by an extended discussion."

We have not found any case nor have petitioners throughout these proceedings cited us to one holding that because one may have to relinquish a *benefit* flowing from a contract within the statute of frauds, the opposing party will be estopped from relying upon the statute, yet that is this case in its entirety.

Before embarking upon a consideration of the evidence or the law, however, we wish to place this Petition for Certiorari within its proper context. Once more, as in the trial court and in the Court of Appeals, we are treated to a lengthy plea of misery and pathos. "In this case certiorari alone can retain for this elderly couple, the home which was orally promised them for life" (Pet. p. 30). As the Court of Appeals observed: "Counsel for plaintiffs has pulled all stops to establish the pathos of the position of his elderly clients" [Rec. p. 161]. And as is apparent from the quoted excerpts of the trial court's oral opinion, that court permitted its judgment to be grounded upon sympathy rather than the law:

> "The Circuit may decide we have allowed our emotions to get the better of us and our sympathies to get the better of us * * *." (Appx. A to Pet. p. 4.)

Perhaps we have been remiss in dwelling too much upon the established law and too little upon the reverse side of this emotional plea. In the first place, throughout their petition to this court, and throughout their brief in the court below, petitioners *assume* and take for granted the very fact in issue in the litigation, namely that they were in fact granted a life estate in the Lindbrook Drive house. That allegation of their complaint [Rec. p. 4] was, of course, denied by respondent's answer [Rec. pp.

25-26] and was sought to be proved only by incompetent testimony to which stipulated objection was made [Stip. of Facts, par. 9; Rec. pp. 49-50]. The Court of Appeals has held in effect that the objection was well taken in the absence of any writing sufficient to satisfy the statute of frauds [Rec. p. 159].

But apart from assuming the very fact in issue—that Mrs. Bach's father and mother *did give* the Perkins the Lindbrook Drive house for life—where would Mrs. Bach find herself but for the shield of the statute of frauds, which for nearly 300 years has required that certain of the more important transactions in life be dignified by a writing as a protection against fraud. Death has forever stilled the lips of the only other parties to this alleged oral conveyance purportedly made by Dr. and Mrs. Haddcock, respondent's father and mother, in 1938 in Los Angeles [Stip. of Facts pars. 9, 13 and 21; Rec. pp. 49-50, 51 and 54] at a time when Mrs. Bach was not present [Rec. pp. 147-148]. It is the word of the petitioners against the silence of the grave.

Full fee title to the property in question was conveyed to respondent by her mother in 1943 by a warranty deed containing no suggestion or reservation of a life interest in the Perkins or anyone else [Rec. pp. 9-11]. Petitioners admit that it was not until after November, 1952, when Mrs. Bach gave notice of termination of their tenancy, that they first notified her that they claimed a life tenancy in the premises [Rec. pp. 41-42].

Mrs. Bach may not be as elderly as the Perkins and she may have more money, but she has been deprived of her property and the right to sell it, she has been deprived of its fair rental value and has had to pay substantial

taxes on the premises during three long and expensive years of litigation, litigation founded only upon the Perkins' uncorroborated statement that two people now dead orally gave them the right to live in the property for life. If pathos and emotion is to play any part in this case, we suggest it is Mrs. Bach rather than the Perkins who should elicit the sympathy of the court.

However, we do not conceive that this or any other decision should be based upon sympathy, emotion or pathos, and so we come to the merits of the pending petition.

I.

For an Estoppel to Rely Upon the Statute of Frauds There Must Be Some Change of Position to the Detriment of Him Who Invokes the Estoppel.

There is no conflict among the circuits and there is no question of abuse or lack of abuse of discretion of the trial judge unless petitioners' premise is correct that the law of estoppel to rely upon the statute of frauds is unresolved or is in a state of doubt in California. Expressed differently, if the law as established by the courts of the State of California supports the statement of the Court of Appeals that "any kind of an estoppel as a minimum involves some kind of a reliance or change of position to the detriment of him who asserts estoppel," then the Petition for Certiorari is clearly without merit.

According to the contention of petitioners, Dr. and Mrs. Hadcock when they purchased the Lindbrook Drive house in Beverly Hills, California, in 1938, verbally represented to petitioners that they might occupy the premises for the rest of their lives and pay such rental therefor as

they could afford [Stip. of Facts, par. 9; Rec. p. 49]. They thereupon moved into the premises and have lived there ever since, and thereby adopted and became accustomed to a standard of living in keeping with the premises which they could not otherwise have afforded [Stip. of Facts, par. 11; Rec. p. 50]. For a few years they paid rent at the rate of $50.00 per month [Stip. of Facts, par. 12; Rec. p. 51] and from about 1944 to date they have paid a nominal rental of $15.00 a quarter [Stip. of Facts, pars. 16, 18 and 29; Rec. pp. 52-54]. This rental per year is approximately one-tenth of the amount of real property taxes which respondent has had to pay on the premises each year [Stip. of Facts, par. 27; Rec. p. 57]. Petitioners admit that they made no permanent improvements to the premises and have paid no consideration "other than rent, gardening and minor repairs, for their tenancy of the premises."[2] These are the facts upon which they would raise an estoppel.

Liberal though the law of California may be in its application of estoppel to a plea of the statute of frauds[3] the minimal requirement of a change of position *to the detriment of him who asserts estoppel* remains, as it always has, a *sine qua non* to the intervention of an equitable estoppel. To hold otherwise would be to repeal by

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[2]Petitioners Answers to Interrogatories 5 and 12 [Rec. pp. 38 and 42], received in evidence by stipulation [Stip. of Facts, par. 29, Rec. p. 57].

[3]Stanford Law Review 281.

judicial decision the code law of the state (Cal. Civ. Code, Sec. 1624(4); Cal. Code Civ. Proc., Sec. 1973(4)).[4]

The law is clear in California, as elsewhere, that mere loss of benefits or expected profits from the verbal contract is not sufficient hardship or detriment in reliance upon the contract to invoke estoppel.

The position of the petitioners is similar to that of the appellant in *Little v. Union Oil Co.*, 73 Cal. App. 612, 238 Pac. 1066, of whom the court said at page 620:

> "Appellant's position, in view of the facts pleaded, is that of one who, while he has relied on representations which, the other elements being present, would result in an estoppel, has not changed his position to his injury; but, the general market conditions being such that a resale at a profit is certain, he contends

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[4]Section 1624 of the Civil Code of the State of California provides:

> "The following contracts are invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent:
> * * *
> 4. An agreement for the leasing for a longer period than one year or for the sale of real property or of an interest therein;
> * * *"

Section 1973 of the Code of Civil Procedure of the State of California provides:

> "In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:
> * * *
> 4. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; * * *"

that to permit the seller to assert the invalidity of the oral agreement would result in a change of his otherwise advantageous position in the market and a consequent loss.

"The result of such application of the doctrine would be its use as an instrument of gain or profit while its object is protective and limited to saving harmless or making whole the person in whose favor it arises (21 Cor. Jur., p. 1118; *Adler v. Pin,* 80 Ala. 351; *Lindsay v. Cooper,* 94 Ala. 170 (33 Am. St. Rep. 105, 16 L. R. A. 813, 11 South, 325); *Ramsey v. Chilson,* 57 Cal. App. 785, 788 (208 Pac. 319))."

Other California cases denying application of the doctrine of estoppel where no detriment from change of position is shown other than loss of expected benefits are:

Bogan v. Wiley, 72 Cal. App. 2d 533, 538, 164 P. 2d 912;

Ruinello v. Murray, 36 Cal. 2d 687, 689, 227 P. 2d 251;

Hawke v. Ellwanger, 108 Cal. App. 105, 107, 291 Pac. 279;

Ramsey v. Chilson, 57 Cal. App. 785, 787, 208 Pac. 319;

Stowe v. Fay Fruit Co., 90 Cal. App. 421, 426, 265 Pac. 1042;

Anderson v. Stansbury, 38 Cal. 2d 707, 715, 242 P. 2d 305;

Mason v. Home Ins. Co., 10 Cal. App. 2d 696, 697, 52 P. 2d 491;

Anson v. Townsend, 73 Cal. 415, 418, 15 Pac. 49;

Offeman v. Robertson Cole Studios, Inc., 80 Cal. App. 1, 15, 251 Pac. 830;

Standing v. Morosco, 43 Cal. App. 244, 248, 184 Pac. 954.

In the two cases last cited it is held that no detriment is presumed to result simply from a change of residence in reliance upon an undertaking within the statute of frauds.

Acknowledged as the leading case in California upon the subject of equitable estoppel,[5] *Seymour v. Oelrichs,* 156 Cal. 782, 106 Pac. 88, clearly sets forth the circumstances under which an estoppel to rely upon the statute of frauds may be raised, page 794:

> "It was said in *Glass v. Hulbert,* 102 Mass. 24, 35, 3 Am. Rep. 418: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to making expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement *is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss.*[6] In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting 'up the statute of frauds.' *This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise.* (See 5 Browne on Statute of Frauds, sec. 457a.) In the section last cited, Mr. Browne says: 'A plaintiff . . . must be able to show clearly

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[5] *Wilson v. Bailey,* 8 Cal. 2d 416, 422, 65 P. 2d 770.

[6] Emphasis ours unless otherwise noted.

> . . . not only the terms of the contract, but also such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, to so far alter his position as to incur an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense. After proof of this, the court may well be justified in using its undoubted power, in cases of equitable estoppel, to refuse to listen to a defendant seeking to deny the truth of his own representations previously made.' "

Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P. 2d 737, relied upon by petitioners, is a relatively late California case upon the subject of estoppel and cites most of the California cases. The presence of both a change of position to the detriment of the promisee and unjust enrichment of the one seeking to invoke the statute of frauds are emphasized in the opinion. At page 624 of 35 Cal. 2d the court said:

> "In this case both elements are present. In reliance on Natale's repeated assurances that he would receive the property when Natale and Carmela died, Christie gave up any opportunity to accumulate property of his own and devoted his life to making the family venture a success. That he would be seriously prejudiced by a refusal to enforce the contract is made clear by a comparison of his position with that of Rosie and Nick Norcia. Because the Norcias were able to make a small investment when the family venture was started, their interest, now worth ap-

proximately $100,000, has been protected. Christie, on the other hand, forbore from demanding any present interest in the venture in exchange for his labors on the assurance that Natale's and Carmela's interest would pass to him on their death. Had he invested money instead of labor in the venture on the same oral understanding, a resulting trust would have arisen in his favor. (*Byers v. Doheny,* 105 Cal. App. 484, 493-495 (287 P. 988); see, Restatement, Trusts, §454, comment J., illus. 12.) His 20 years of labor should have equal effect. On the other hand, Natale reaped the benefits of the contract. He and his devisees would be unjustly enriched if the statute of frauds could be invoked to relieve him from performance of his own obligations thereunder."

Petitioners do not accurately or fully state the law of California or, to our knowledge, the law of any other state, when they say "Under California law, hardship is a basis for estoppel" (Pet. p. 24); it is, rather, detriment following upon a change of position in reliance upon an oral contract or representation which gives rise to a possible estoppel. Thus in *Wilk v. Vincill,* 30 Cal. 2d 104, 180 P. 2d 531, a case arising on the sufficiency of the pleadings and relied upon by petitioners (Pet. p. 25), the decision was based upon plaintiff's allegation of the loss of an opportunity to purchase another house in the neighborhood within his price range in reliance upon the defendant's representation. In fact, the court made the very distinction we make in the case at bar when it said at page 108, *"He thereby lost more than the subject of the agreement;* he lost the opportunity to purchase another home." The *only* detriment shown in the record at bar is

the potential loss to the Perkins of the subject of the alleged agreement, to-wit: the Lindbrook Drive house.

Similarly in *Klein v. Farmer*, 85 Cal. App. 2d 545, 194 P. 2d 106, relied on by petitioners (Pet. p. 26)[7] the court noted, page 553:

> "We agree with defendant's statement that in handing the endorsed certificates to the defendant decedent 'used language which, regardless of legal refinements as to the exact time when title was to pass, must necessarily have been calculated to convey to the defendant the impression that if she continued in his service until his death, she would be the unqualified owner of the stock. Believing that she had been provided for, and relying on that belief, the defendant carried out her part of the agreement by discontinuing her business and sacrificing the income she had derived from it, and by assuming for (almost) the ensuing seven years, the arduous and often unpleasant duties involved in the care of an aged and crippled person. In addition, during the latter part of the period, she gave up her normal home life, including the frequent visits that she had previously enjoyed with her children.' "

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[7]Petitioners' quotations from the case are singularly misleading as a reading of the opinion will demonstrate.

II.
No Unjust Enrichment Is Shown.

Thus we find in every case,[8] in which an estoppel to raise the statute of frauds has been present, an actual change of position to the detriment of him who would assert the estoppel. The law on the subject is neither unsettled nor in doubt in the State of California.

The Court of Appeals in the present case based its reversal upon a complete absence from the record of any showing of detriment suffered by petitioners from their reliance upon what they assert to have been the verbal representations made to them by the now deceased Hadcocks; nothing is said in the opinion of the other possible ground for invoking an estoppel, namely, unjust enrichment of the party seeking to rely upon the statute of frauds (see *Monarco v. Lo Greco,* 35 Cal. 2d 621, at 623, and cases there cited). The reason is clear for the record is wholly barren of any conceivable basis for a finding of unjust enrichment and in fact the trial court found none (Appx. B to Pet.).

The closest petitioners can come to a claim of unjust enrichment is that almost a year and a half[9] after her mother had transferred title to the Lindbrook Drive house to her daughter, Mrs. Bach, the latter is claimed to have

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[8]With the exception of a limited number of unjust enrichment cases referred to below.

[9]The deed to Mrs. Bach is dated November 26, 1943 [Stip. of Facts, par. 15, Rec. p. 51]; the letter from Mrs. Hadcock to the Perkins is dated March 19, 1945 [Stip. of Facts, par. 17, Rec. p. 53].

said "Tell Uncle Fred I will be the same kind of a 'landlord' as Mother has been and will never do any differently than she has." In the complete absence of any proof that respondent knew at the time that the Perkins claimed a life tenancy in the premises,[10] not only is the statement completely consistent with Mrs. Bach's actions in treating the Perkins as tenants at will and retaining the nominal rental agreed to by her mother but the statement having been made a year and a half after the conveyance of title to the premises to her [Stip. of Facts, pars. 15 and 17, Rec. pp. 51 and 53] it could not have been either consideration for or referable to the transfer of title.

It is even more preposterous to attempt to urge that because Mrs. Hadcock by her will dated July 29, 1947, left the bulk of her estate to her daughter and granddaughter, the daughter would be unjustly enriched if she is allowed to exercise her rights as owner of the Lindbrook Drive house. Of greater significance is the fact that in that same will the Perkins were bequeathed seven thousand dollars [Rec. p. 76] by Mrs. Hadcock and, as in the case of the warranty deed to Mrs. Bach, not a single mention is made in the will of the fact that they had or had been given a life tenancy in the house as they now claim.

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[10]She was not advised of the claim to a life tenancy until December 1952 [Answer to Interrogatory No. 10, Rec. p. 41].

III.

Any Other Decision Than That of the Court of Appeals Would Create a Devastating Precedent.

This is an important case, not in the sense of national importance but in the sense that a gross injustice and regrettable precedent would have been established had the trial court's decision been permitted to stand. We have demonstrated, we believe, that under clearly established California law the very minimum requirement for an estoppel was completely lacking—namely, a change of position in reliance upon an oral agreement to the detriment of him who asserts the estoppel. A glance at the trial court's oral pronouncement from the bench (Appx. A to Pet.) shows that its decision is not based on any consideration of the applicable law but on misplaced sympathy for the age and financial condition of the Perkins. The actions of both the Hadcocks and the respondent, even if we accept petitioners' own statement of the facts (Pet. pp. 6-10) are as completely, if not more, consistent with a tenancy at will or from month to month as with a life estate. But more important than all of these is the fact that title to literally millions of properties could be thrown into jeopardy if the petitioners' contentions here were approved. The persons who made the alleged representations in 1938 are both dead. Mrs. Bach has no means of controverting the claim of the Perkins that they were given a substantially rent free life tenancy except by reliance upon the statute of frauds. What would prevent any tenant under a verbal tenancy upon

the death of his landlord from claiming that he was assured a life tenancy or a ten year term at a nominal rent? If equity would enforce such claims without the limited measure of written proof called for by the statute of frauds title to property such as that of Mrs. Bach in the present case would be uncertain indeed. Nor would the impact be felt only upon title to real property for the statute of frauds covers other forms of business transaction.

As was said by the court in *Ramsey v. Chilson,* 57 Cal. App. 785, 787, 208 Pac. 319:

> "Upon the meager facts found, to hold that defendant is estopped from denying the execution of the contract by her would be tantamount to a nullification of the statute made for the protection of those who hold estates in land. As was well said by the supreme court in *Davis v. Davis,* 26 Cal. 23 (85 Am. Dec. 157); 'The doctrine of estoppel *in pais* should not be too readily extended when the effect of it is to divest men of their estates in lands. It should be remembered that we have a statute which makes a writing essential to the assignment or creation of an estate in real property, and that one of the objects of such statute was to render estates secure.' Moreover, estoppel is never intended to work a gain to a party; its office is to protect him from a loss which, but for the estoppel, he could not escape. (*Conway v. Supreme Council,* 137 Cal. 384 (70 Pac. 223); *Scott v. Jackson,* 89 Cal. 258 (26 Pac. 898).) In the instant case plaintiff has incurred no loss."

The decision of the trial court was so clearly erroneous and contrary to law that the Court of Appeals, even though expressing sympathy for the Perkins and in obvious reluctance, was compelled to reverse it.

IV.

Conclusion.

We close by commenting upon petitioners' reason No. 4 for granting certiorari (Pet. p. 14), to demonstrate the loose and almost cavalier manner in which they seek to invoke the jurisdiction of this court. They state: *"In permitting respondent to renege upon the promises of her parents"* (again gratuitously assuming the promises to have been made. The so-called promises were denied and petitioners have been unable to produce any writing to substantiate them) *"as recognized by her"* (the record conclusively shows that Mrs. Bach did not even learn of petitioners' claimed life tenancy until the eve of this litigation), *"the Court of Appeals has condoned an act of cruelty and injustice."* (Petitioners' statement of the facts shows that for years the Perkins have been the recipients of charity from their indulgent relatives. The only "act of cruelty and injustice" of which the Court of Appeals can be accused is its conclusion that petitioners have failed to produce competent evidence sufficient to prevent respondent from selling a house which is admittedly hers. It is indeed an extravagant expression to castigate as an act of cruelty and injustice an opinion the effect of which is to hold that Mrs. Bach is under no legal compulsion to continue contributing to the support of her aunt and uncle, at least to the extent of continuing them in possession on a substantially rent free basis of a house the respondent now desires to sell.)

Perhaps in the manner of advocates we tend toward partiality, but we frankly fail to see where petitioners have any claim upon the sympathy of the court when at best they show only that a small portion of the bounty they have come to expect from their relatives over the

years may be lost to them if respondent after three expensive years of litigation is permitted to treat as her own the house which her mother gave her in fee in 1943.

The Petition for Writ of Certiorari and Petition for Leave to Proceed in Forma Pauperis should each be denied. (See *Murphy v. Bird*, 275 U. S. 487, 72 L. Ed. 387, 48 S. Ct. 38 and cases there cited.)

Respectfully submitted,

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